

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



*affidavit*

**75-7554**

**United States Court of Appeals**

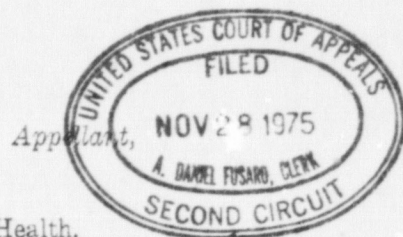
**FOR THE SECOND CIRCUIT**

**Docket No. 75-7554**

HARRY JACOBSON,

—v.—

CASPER WEINBERGER, Secretary of Health,  
Education and Welfare,



ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**APPELLEE'S BRIEF**

THOMAS J. CAHILL,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*

THOMAS H. BELOTE,  
*Special Assistant United States Attorney,  
Of Counsel.*

3  
4

THB:ml  
75-7554  
M-1179

TABLE OF CONTENTS

	<u>Page</u>
Statement of the Case . . . . .	1
Statement of the Issue. . . . .	2
Statement of Facts. . . . .	2
Relevant Statutes . . . . .	4
ARGUMENT:	
The District Court Properly Granted The Defendant's Motion For Summary Judgment And Dismissed The Complaint In That The Plaintiff's Retirement Insurance Bene- fits Had Been Correctly Computed Under The Relevant Statutory Provisions . . . . .	7
CONCLUSION. . . . .	13

THB:nc  
75-7554  
M-1179

---

---

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-7554

---

HARRY JACOBSON,

Appellant,

- v -

CASPER WEINBERGER, Secretary of  
Health, Education and Welfare,

Appellee.

---

---

---

APPELLEE'S BRIEF

---

---

Statement of the Case

Appellant brought this action in the United States District Court for the Southern District of New York under Section 205(g) of the Social Security Act, as amended (hereinafter referred to as the "Act"), 42 U.S.C. § 405(g), to review a final determination of the Secretary of Health, Education and Welfare, (hereinafter referred to as the "Secretary"), which found that the appellant's re-

retirement insurance benefits had been correctly computed by the government. As there was no dispute to any material fact the case was submitted upon each party's cross-motions for summary judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure.

The Honorable Robert J. Ward granted the Government's motion for summary judgment and denied Jacobson's cross-motion for summary judgment in a written opinion dated August 8, 1975. (Harry Jacobson v. Casper Weinberger, Secretary of Health, Education and Welfare, 74 Civ. 5059 S.D.N.Y.). On September 17, 1975 the Government's order requesting the complaint be dismissed was signed by Judge Ward. This appeal followed.

Statement of the Issue

Whether the District Court correctly dismissed the action below after a finding that the appellant's Old Age Insurance benefits had been properly computed by the Secretary.

Statement of the Facts

The facts before the District Court were not in dispute and can be summarized as follows:

Jacobson filed an application for retirement insurance benefits on November 1, 1965. His date of birth is January 23, 1901, and thus he attained age 65 on January

23, 1966 (Tr. 19-23).<sup>1/</sup> A certificate of Social Insurance Award dated January 12, 1966 states that although he was entitled to receive benefits as of January, 1966, no current checks would be forthcoming because his 1966 earnings might exceed statutory limits. The Certificate also indicated that claimant should report his earnings for the remainder of 1966 once they were known (Tr. 25). On July 14, 1966, Jacobson elected to receive reduced benefits payable effective November, 1964, fourteen months in advance of his attaining age 65 (Tr. 44). A check dated February 20, 1967, in the amount of \$840.80 represented benefits for November and December, 1964 plus benefits for May, 1965 through December, 1965. It was determined that no benefits were payable for January, 1965 through April, 1965 because he had earnings in 1965 of \$1,853 (Tr. 45).

For the years 1966-1969, 1971 and 1972, Jacobson periodically received lump sum benefit checks reflecting benefits due for an entire year as well as the deductions due to excess earnings for that year. Benefits for these years had been recalculated several times to give him credit for his most recent earnings and all amendments to the Act. For 1970, Jacobson received no benefits since he had earned

---

1/ References preceded by "Tr." are to the certified administrative record which has been filed with the Court.

M-1179 \$5166 and thus exceeded the statutory limit. Since January, 1973 when the claimant attained age 72, Jacobson had been receiving monthly benefit checks. These benefits have also been recalculated on several occasions to give him credit for his most recent earnings and all amendments to the Act.

Plaintiff's earnings record is as follows:

1951	\$3600.00	1958	\$2083.56	1965	\$1853.02
1952	3600.00	1959	1229.46	1966	1008.55
1953	3600.00	1960	None	1967	1603.40
1954	3600.00	1961	None	1968	1647.00
1955	None	1962	889.78	1969	1566.00
1956	4200.00	1963	None	1970	5166.00
1957	3410.62	1964	1158.00	1971	3236.00

Jacobson requested a hearing before an administrative law judge who considered the case de novo. On May 22, 1974, the administrative law judge issued a decision holding that the claimant's monthly benefits had been correctly computed (Tr. 11-14). The decision of the administrative law judge became the final decision of the Secretary when it was affirmed by the Appeals Council on August 23, 1974 (Tr. 6).

#### Relevant Statutes

42 U.S.C. §402 (§202 of the Act) provides in part:

- (a) Every individual who --
- (1) is a fully insured individual (as defined in section 214(a)),
  - (2) has attained age 62, and
  - (3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained age of 65,
- shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Except as provided in subsection (q) and subsection (w), such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 215(a)) for such month.

(q)(1) If the first month for which an individual is entitled to an old-age, wife's husband's, widow's, or widower's insurance benefit is a month before the month in which such individual attains retirement age, the amount of such benefit for such month and for any subsequent month shall, subject to the succeeding paragraphs of this subsection, be reduced by --

(A)  $\frac{5}{9}$  of 1 percent of such amount if such benefit is an old-age insurance benefit,  $\frac{25}{36}$  of 1 percent of such amount if such benefit is a wife's or husband's insurance benefit, or  $\frac{19}{40}$  of 1 percent of such amount if such benefit is a widow's or widower's insurance benefit, multiplied by --

(B)(i) the number of months in the reduction period for such benefit (determined under paragraph (6)(A)), if such benefit is for a month before the month in which such individual attains retirement age, . . .

42 U.S.C. §415 (\$215 of the Act) provides in part:

(a)(1) . . . such primary insurance amount shall be whichever of the following amounts is the largest:

(A) the amount in column IV of the following table . . . on the line on which in column III of such table appears his average monthly wage (as determined under subsection (b)); . . .

(b)(1) For the purposes of column III of the table appearing in subsection (a) of this section, an individual's "average monthly wage" shall be the quotient obtained by dividing --

(A) the total of his wages paid in and self-employment income credited to his "benefit computation years" (determined under paragraph (2)), by

(B) the number of months in such years.

(2)(A) The number of an individual's "benefit computation years" shall be equal to the number of elapsed years (determined under paragraph (3) of this subsection), reduced by five, except that the number of an individual's benefit computation years shall in no case be less than two.

(B) An individual's, "benefit computation years" shall be those computation base years, equal in number to the number determined under subparagraph (A), for which the total of his wages and self-employment income is the largest.

(C) For purposes of subparagraph (B), "computation base years" include only calendar years in the period after 1950 and prior to the earlier of the following years --

(i) the year in which occurred (whether by reason of section 202(j)(1) or otherwise) the first month for which the individual was entitled to old-age insurance benefits, or

(ii) the year succeeding the year in which he died. . . .

(f)(2) If an individual has wages or self-employment income for a year after 1965 for any part of which he is entitled to old-age insurance benefits, the Secretary shall, at such time or times and within such period as he may by regulations prescribe, recompute such individual's primary insurance amount with respect to each year. Such recomputation shall be made as provided in subsections (a)(1)(A) and (C) and (a)(3), as though the year with respect to which such recomputation is made is the last year of the period specified in subsection (b)(2)(C).

#### ARGUMENT

THE DECISION OF THE SECRETARY THAT APPELLANT'S MONTHLY RETIREMENT INSURANCE BENEFITS HAD BEEN CORRECTLY COMPUTED IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS THEREFORE ENTITLED TO AFFIRMANCE

42 U.S.C. §402(a) (§202(a) of the Act) sets forth the requirements for entitlement for old age insurance benefits. It provides that an individual's monthly benefit shall be equal to his primary insurance amount (as defined in 42 U.S.C. §415(a)) except as provided in 42 U.S.C. §402(q) and (w).

An individual's primary insurance amount, as set forth in the tables<sup>2/</sup> in 42 U.S.C. §415(a), is based on his "average monthly wage" under 42 U.S.C. §415(b). The "average monthly wage" for men is computed by adding the number

---

<sup>2/</sup> The primary insurance amount tables have been amended in recent years so as to grant old age insurance recipients increased benefits.

M-1179

of years after 1950 until the year in which the individual attains age 65. The earnings in these years are also added. The five years with the lowest earnings and those corresponding earnings are removed from the computation. The total earnings are divided by the total of months in the years. The result is the average monthly wage. The earnings after 1936 may be used in the aforementioned formula if it will be more advantageous to the recipient. However, in the instant case, only the earnings after 1950 have been used. 42 U.S.C. §415(f) provides that if an individual has earnings for a year after 1965 for which he is entitled to old age insurance benefits, the Secretary shall recompute the "average monthly wage" based on the new earnings and arrive at a new primary insurance amount. In such recomputation, any years of higher earnings are to be substituted for years with lower earnings.

Finally, 42 U.S.C. §402(q) provides for a reduction in the amount of the monthly benefit if the beneficiary is entitled to benefits prior to age 65. In this case, the primary insurance amount as discussed above is reduced by five-ninths of one percent for each month before age 65 for which the person accepts payments of his benefits.

In the instant case, Jacobson attained the age of 65 on January 23, 1966. Thus Jacobson was eligible to receive old age insurance benefits effective at that time.

However, he elected to receive benefits effective November, 1964. Pursuant to 42 U.S.C. §402(q), the amount of the benefit is reduced by  $\frac{5}{9}$  of one percent multiplied by the number of months for which the claimant received early benefits.<sup>3/</sup>

In his complaint, Jacobson alleged that 42 U.S.C. §402(q) should not be applied in the instant case. Although it is not clear from the complaint whether Jacobson admitted that he elected to receive early benefits, his statement appearing in the record (at 44) confirms this election. In the District Court Jacobson referred to his Certificate of Social Insurance Award as indicating that no payments were made for the period prior to his attaining age 65. However, this certificate merely indicates that he could not receive current benefits until his earnings were known. On or about February 20, 1967, Jacobson received a check in the amount of \$840.80 representing benefits due for November and December, 1964 and May through December, 1965. He received no benefits for January through April, 1965 because his earnings for 1966 required a reduction in benefits.

---

3/ The  $\frac{5}{9}$  of one percent reduction is assessed against his "primary insurance amount" as in effect on the date he attained age 65. Thus, in utilizing the  $\frac{5}{9}$  reduction factor in January, 1966, Jacobson's benefit was reduced by \$4.80. In later years, although plaintiff's primary insurance amount may have been increased, the \$4.80 flat reduction continued and no percentage reduction in the new primary insurance amount was assessed.

It appears that Jacobson also alleged that §402(q) should not be applied because: (1) 42 U.S.C. §402 precludes the application of this section and (2) 42 U.S.C. §415(b) precludes its application to benefits for months prior to January, 1966. It is submitted that his interpretation of these sections is erroneous. First, §402(a) states "Except as provided in subsection (q). . . ., such individual's old age insurance benefit for any month shall be equal to his primary insurance amount for such month". Thus §402(a) does not preclude the application of subsection (q) but indicates that subsection shall be utilized in determining on individual's benefit. Second, §415(b)(4) indicates that it is applicable to the instant case.<sup>4/</sup>

The appellant also alleged that the Secretary had incorrectly used §415(f)(2) to recompute his benefits because of his new earnings. As indicated earlier, an individual's benefit is determined by his average monthly wages. §415(f)(2) provides that if an individual has earnings after 1965 and his average monthly wage had been previously computed, the Secretary shall recompute the average monthly wage taking into account the new earnings. In the instant case Jacobson has had new earnings, and the Secretary recomputed his average monthly wage taking into account the new earnings. Jacobson also argued that §415(f)(2) requires

---

4/ The tables in §215 are occasionally amended and modify benefits as of the effective date of the amendment.

that if an individual has new earnings, only these earnings may be used in computing the average monthly wage. This is erroneous. The prior earnings (other than those that may be removed from the computation because these earnings become the lowest earnings) continue to be utilized in computing the average monthly wage.

It is submitted the appellant's interpretations of certain sections of the Social Security Act are incorrect. The Secretary lawfully computed Jacobson's average monthly wage and the resulting benefits. The decision of the administrative law judge explains this quite clearly. All of the average monthly wage recomputations have been properly performed. Jacobson stated in his supplementary affidavit of April 21, 1975 that he was entitled to benefits for 1970. However, in his analysis of 42 U.S.C. §403 as applied to 1970 earnings, Jacobson admitted that \$1 for every \$2 of benefits should be withheld for an individual's earnings between \$1680 and \$2880, and that a dollar for dollar reduction must be made for earnings over \$2880. Applying the above formula to appellant's 1970 monthly primary insurance amount of \$129.50,<sup>5/</sup> one observes that Jacobson's yearly primary

---

<sup>5/</sup> His 1970 primary insurance amount was not determined solely with respect to the 1970 earnings. Previous earnings are taken into account under 42 U.S.C. §415(b).

insurance amount (12 x \$129.50) is \$1554. His excess earnings are one half of \$1200 (\$2880 minus \$1680) plus \$2236 (\$5116 minus \$2880) which equals \$2836. This exceeds his yearly primary insurance amount of \$1554, and he is entitled to no 1970 benefits.

Similarly, all amendments to the primary insurance amount tables of \$215 are accurately reflected in appellant's benefits. For example, as a result of the 10% increase in primary insurance amounts required for 1971, Jacobson's 1970 primary insurance amount of \$129.50 was increased to \$142.50. This latter figure was further increased to \$151.60<sup>6/</sup> as a result of the Secretary's §415(f)(2) average monthly wage recalculation. The 1972 Social Security Amendments provided a 20% increase in the primary insurance amount effective in September, 1972. Thus his primary insurance amount was increased from \$151.60 to \$189.50.<sup>7/</sup>

---

6/ \$151.60 was reduced to a \$146.80 monthly benefit due to the §402(q) deduction of \$4.80.

7/ The monthly benefit was reduced to \$184.70. See n. 5.

M-1179

CONCLUSION

It is respectfully submitted that the decision of the Secretary is supported by substantial evidence and should be affirmed. The District Court's decision should be affirmed.

Dated: New York, New York

November 1975

Respectfully submitted,

THOMAS J. CAHILL  
United States Attorney for the  
Southern District of New York  
Attorney for Appellee

THOMAS H. BELOTE  
Special Assistant United States Attorney  
Of Counsel

AFFIDAVIT OF MAILING

CA 75-7554

State of New York     )  
County of New York    ) ss

Pauline P. Troia,           being duly sworn,  
deposes and says that she is employed in the Office of the  
United States Attorney for the Southern District of New York.

That on the 28th day of  
2 copies  
November 19 75 she served ~~acopy~~ of the within  
govt's brief

by placing the same in a properly postpaid franked envelope  
addressed:

Harry Jacobson,  
611 Broadway  
New York, NY 10012

And deponent further says  
she sealed the said envelope and placed the same in the  
mail chute drop for mailing in the United States Courthouse, Annex,  
~~Reese Square~~, Borough of Manhattan, City of New York.  
One St. Andrews Plaza,

Pauline P. Troia

Sworn to before me this

28th day of November 19 75

Ralph L. Lee

RALPH L. LEE  
Notary Public, State of New York  
No. 41-2292838 Queens County  
Term Expires March 30, 1977

